Public Prosecutor v Sayed Shahriman bin Wan Ahmad Hussein

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-09(H)-156–07 OF 2023

AZIZAH NAWAWI, MOHAMED ZAINI MAZLAN, JJCA AND ALWI ABDUL WAHAB, JHC

23 SEPTEMBER 2024

Criminal Law — Sentence — Appeal against sentence — Respondent charged for offence of drug possession — Respondent pleaded guilty — Sentencing provision in amended charge provided for whipping of 'less than ten strokes' instead of 'not less than ten strokes' as provided under s 39A(2) of the Dangerous Drugs Act 1952 — Sessions court imposed four strokes of whipping based on erroneous sentencing provision in amended charge — Whether sentencing provision must be stated in a charge and consequently formed part of the charge — Whether court was constrained to pass sentencing provision expressed in a charge even where it was erroneous

Criminal Procedure — Charge — Defective charge — Respondent charged for offence of drug possession — Respondent pleaded guilty — Sentencing provision in amended charge provided for whipping of 'less than ten strokes' instead of 'not less than ten strokes' as provided under s 39A(2) of the Dangerous Drugs Act 1952 — Sessions court imposed four strokes of whipping based on erroneous sentencing provision in amended charge — Whether sentencing provision must be stated in a charge and consequently formed part of the charge — Whether court was constrained to pass sentencing provision expressed in a charge even where it was erroneous — Criminal Procedure Code ss 152, 153, 154, 173 & Form 27 — Dangerous Drugs Act 1952, ss 6 & 39A(2)

The respondent was charged at the sessions court for an offence of drug possession under s 6 of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39A(2) of the same Act. The respondent had pleaded guilty to the said charge and he was sentenced to seven years of imprisonment and four strokes of whipping. The error lay in the number of strokes for whipping, as the minimum number of strokes for the offence was ten strokes as per s 39A(2) of the DDA. The sessions court had relied on the sentencing provision stated in the amended charge, as the prosecution had erroneously stated 'less than ten strokes' instead of 'not less than ten strokes'. The prosecutors only realised the error later and appealed to the High Court. The High Court, however, dismissed the appeal and maintained the four strokes of whipping imposed on the basis that the respondent had pleaded guilty to the amended charge, even if the sentencing provision stated in the amended charge was

erroneous. Aggrieved, the prosecution filed the present appeal. The issues to be determined in the present appeal were: (a) whether the sentencing provision must be stated in a charge and consequently formed part of the charge; and (b) whether the court was constrained to pass the sentencing provision expressed in a charge even where it was erroneous.

Held, setting aside both conviction and sentence and ordering that the case be remitted back to sessions court for a retrial:

(1) Sub-section 153(1) of the Criminal Procedure Code ('the CPC') required the charge to contain the particulars of the time and place of the alleged offence and the person against whom the offence was allegedly committed as reasonably sufficient to give the accused notice of the matter he was charged with. Under s 154 of the CPC, the charge should contain particulars of how the alleged offence was committed if the particulars mentioned under ss 152 and 153 did not give the accused sufficient notice of the matter he was charged with. The format of a charge was provided in Form 27 in the CPC (see para 16).

(2) Prosecutors had made it a practice to set out the sentence applicable to the offence in the charge form, possibly for convenience. However, there was no requirement for the sentence concerning the offence to be stated in the charge under the CPC, nor was this set out in Form 27 in the CPC. It was, therefore, optional for the sentence of the offence to be stated in the charge form, for it did not form part of the charge. It was simply not required. A charge, therefore, could not be deemed defective if the particulars of the sentence were not set out or, if set out, was erroneous (see para 18).

(3) The sessions court had adhered to the requirements under s 173 of the CPC as the court informed the respondent of the nature and consequence of pleading guilty, namely the sentence liable to be imposed on him. The sessions court, however, erred when it imposed only four strokes of whipping when at least ten strokes were to be imposed under sub-s 39A(2) of the DDA. The sessions court was bound by the sentencing provision in the DDA and not merely rely on the sentence set out in the amended charge. The fault equally lay with the prosecutor, who should have been more vigilant (see para 21).

(4) The High Court fell into error in deciding that the fairest outcome was to maintain the sentence of four strokes of whipping, as this was in contravention of the mandatory sentencing requirements under sub-s 39A(2) of the DDA, which required no less than ten strokes of whipping. The sentencing provision set out in the charge did not override the Act. Since the High Court opined that the respondent had pleaded guilty to the alleged defective amended charge, which stated whipping of less than ten strokes, he should be given the benefit of doubt, more so

when he was not represented in the sessions court. The High Court should have allowed the appeal and remitted the case to the sessions court for the respondent's plea to be retaken. This directive would have been the fairest outcome. Based on the above findings, the court opined that the conviction recorded against the respondent was unsafe (see paras 19 & 22–23).

[Bahasa Malaysia summary

Responden telah dituduh di mahkamah sesyen atas kesalahan memiliki dadah di bawah s 6 Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum di bawah s 39A(2) Akta yang sama. Responden telah mengaku bersalah terhadap pertuduhan tersebut dan dia dijatuhkan hukuman penjara tujuh tahun dan empat sebatan. Kesilapan terletak pada bilangan sebatan di mana bilangan minimum sebatan untuk kesalahan tersebut ialah sepuluh sebatan seperti yang dikehendaki di dalam s 39A(2) ADB. Mahkamah sesyen telah bergantung kepada peruntukan hukuman yang dinyatakan dalam pertuduhan pindaan, kerana pihak pendakwaan telah tersilap menyatakan 'kurang daripada sepuluh sebatan' dan bukannya 'tidak kurang daripada sepuluh sebatan'. Pendakwa raya hanya menyedari kesilapan tersebut kemudian dan merayu ke Mahkamah Tinggi. Mahkamah Tinggi bagaimanapun menolak rayuan tersebut dan mengekalkan empat sebatan yang dikenakan atas dasar responden telah mengaku bersalah terhadap pertuduhan pindaan tersebut, walaupun peruntukan hukuman yang dinyatakan dalam pertuduhan pindaan tersebut adalah salah. Terkilan, pihak pendakwaan memfailkan rayuan semasa. Isu-isu yang perlu ditentukan dalam rayuan ini ialah: (a) sama ada peruntukan hukuman wajib dinyatakan dalam pertuduhan dan seterusnya menjadi sebahagian daripada pertuduhan; dan (b) sama ada mahkamah dikekang untuk memberikan hukuman sebagaimana yang dinyatakan dalam peruntukan hukuman dalam pertuduhan walaupun peruntukan tersebut salah.

Diputuskan, mengenepikan kedua-dua sabitan dan hukuman, dan memerintahkan agar kes dikembalikan ke mahkamah sesyen untuk perbicaraan semula:

(1) Subseksyen 153(1) Kanun Tatacara Jenayah ('KTJ') menghendaki sesuatu pertuduhan itu mengandungi butir-butir masa dan tempat kesalahan yang dikatakan dan orang yang terhadapnya kesalahan tersebut didakwa dilakukan sebagai cukup munasabah untuk memberikan tertuduh notis mengenai perkara yang dipertuduhkan ke atasnya. Di bawah s 154 KTJ, pertuduhan harus mengandungi butir-butir tentang bagaimana kesalahan tersebut dilakukan jika butir-butir yang disebut di bawah ss 152 dan 153 tidak memberikan tertuduh notis yang mencukupi tentang perkara yang dipertuduhkan ke

atasnya. Format pertuduhan telah diberikan dalam Borang 27 KTJ (lihat perenggan 16).

(2) Pendakwa raya telah menjadikannya satu amalan untuk menyatakan hukuman yang terpakai bagi sesuatu kesalahan dalam borang pertuduhan, mungkin untuk tujuan kemudahan. Walau bagaimanapun, di bawah KTJ, tiada keperluan untuk hukuman bagi kesalahan tersebut dinyatakan dalam pertuduhan, dan ini juga tidak dinyatakan dalam Borang 27 KTJ. Oleh itu, pernyataan hukuman kesalahan dalam borang pertuduhan hanyalah satu pilihan, kerana ia tidak menjadi sebahagian daripada pertuduhan. Ia tidak dikehendaki. Oleh itu, pertuduhan tidak boleh dianggap cacat jika butiran hukuman tersebut tidak dinyatakan atau, jika dinyatakan, butiran tersebut adalah salah (lihat perenggan 18).

(3) Mahkamah sesyen telah mematuhi keperluan di bawah s 173 KTJ kerana mahkamah telah memaklumkan kepada responden tentang sifat dan akibat pengakuan salah, iaitu hukuman yang boleh dikenakan ke atasnya. Mahkamah sesyen, bagaimanapun, terkhilaf apabila hanya mengenakan empat sebatan apabila sekurang-kurangnya sepuluh sebatan sepatutnya dikenakan di bawah sub-s 39A(2) ADB. Mahkamah sesyen terikat dengan peruntukan hukuman dalam ADB dan bukan hanya bergantung kepada hukuman yang ditetapkan dalam pertuduhan pindaan tersebut. Kesalahan juga terletak pada pendakwa raya, yang sepatutnya lebih berhati-hati (lihat perenggan 21).

(4) Mahkamah Tinggi terkhilaf dalam memutuskan bahawa keputusan yang paling adil ialah mengekalkan hukuman empat sebatan, kerana ini bertentangan dengan keperluan hukuman yang mandatori di bawah sub-s 39A(2) ADB, yang menghendaki tidak kurang daripada sepuluh sebatan. Peruntukan hukuman yang dinyatakan dalam pertuduhan tidak mengatasi Akta. Memandangkan Mahkamah Tinggi berpendapat bahawa responden telah mengaku bersalah terhadap pertuduhan pindaan yang didakwa cacat, yang menyatakan sebatan kurang daripada sepuluh sebatan, dia harus diberi faedah keraguan, lebih-lebih lagi apabila dia tidak diwakili di mahkamah sesyen. Mahkamah Tinggi sepatutnya membenarkan rayuan dan mengembalikan kes tersebut ke mahkamah sesyen untuk pengambilan semula pengakuan responden. Arahan ini akan menjadi keputusan yang paling adil. Berdasarkan dapatan-dapatan di atas, mahkamah berpendapat sabitan yang direkodkan terhadap responden adalah tidak selamat (lihat perenggan 19 & 22–23).]

Legislation referred to

Criminal Procedure Code ss 152, 152(4), 153, 153(1), 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 173(b), Chapter XVIII, Form 27

A Dangerous Drugs Act 1952 ss 6, 39A(2)

Appeal from: *Public Prosecutor v Sayed Shahriman bin Wan Ahmad* [2023] MLJU 2150 (High Court, Kuching)

B *Atiqah bt Abdul Karim @ Husaini (Attorney General's Chambers) for the appellant.*
Simon Siah (Simon Siah, Chua and Chow Advocates) for the respondent.

Mohamed Zaini Mazlan JCA:

C

INTRODUCTION

[1] The respondent had pleaded guilty to a drug possession charge in the sessions court. He was sentenced to seven years of imprisonment and four D strokes of whipping. The error lies in the number of strokes for whipping, as the minimum number of strokes for the offence was ten strokes. The sessions court had relied on the sentencing provision stated in the amended charge, as the prosecution had erroneously stated 'less than ten strokes' instead of 'not less than ten strokes'. The prosecutors only realised the error later and appealed to E the High Court. The High Court, however, dismissed the appeal and maintained the four strokes of whipping imposed on the basis that the respondent had pleaded guilty to the amended charge, even if the sentencing provision stated in the amended charge was erroneous.

F

[2] The pertinent issue is whether the sentencing provision must be stated in a charge and consequently forms part of the charge. The other arising issue is whether the court is constrained to pass the sentencing provision expressed in a charge even where it is erroneous.

G

BRIEF FACTS

[3] The respondent was charged at the sessions court for an offence under s 6 of the Dangerous Drugs Act 1952 ('the DDA 1952'), punishable under H s 39A(2) of the same Act. The amended charge read as follows:

> Amended Charge:
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> That you, on 17.9.2022, at about 0945 hrs, at a house addressed No. 142 Lorong 7A Taman Malihah Jalan Matang, in the District of Padawan, in the state of Sarawak, did have in your possession, to wit, 89.77 grams of cannabis, and thereby you have committed an offence under section 6 of the Dangerous Drugs Act 1952 and punishable under section 39A(2) of the Act. I
>
> Sentence:
>
> Life imprisonment or not less than 5 years and less than 10 strokes of whipping.

[4] The respondent was unrepresented. He chose to plead guilty. The sessions court sentenced him to seven years imprisonment and four strokes of whipping from the date of conviction. The prosecution did not object when the sessions court passed the sentence.

[5] The issue is with the sentence on the number of strokes of whipping, as s 39A(2) of the DDA 1952 prescribes whipping of not less than ten strokes. The section reads as follows:

> 39A Increased penalty where the subject matter is the prescribed amount of certain dangerous drugs
>
> (1) ...
>
> (2) Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is —
>
> ...
>
> (f) 50 grammes or more in weight of cannabis;
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> ...
>
> shall instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with *whipping of not less than ten strokes.* (Emphasis added.)

[6] The sessions court had only imposed four strokes of whipping contrary to the minimum ten strokes set out under s 39A(2) of the DDA 1952. The sessions court had relied on the sentencing provision set out in the amended charge on the whipping. The prison authorities and the prosecution later realised this discrepancy. The former sought a revision of the sentence through a letter dated 1 December 2022 to the High Court. The prosecution filed an appeal on 25 November 2022. Both revision and appeal were heard simultaneously by the High Court.

THE APPEAL AT THE HIGH COURT

[7] The prosecution acknowledged the error under the heading of 'sentence' in the amended charge sheet, where it had inadvertently left out the word 'not' before 'less than ten strokes of whipping'.

[8] The prosecution pointed out that the sessions court had informed the respondent that the sentence liable to be imposed on him was not less than ten strokes of whipping in addition to the prison sentence before passing the sentence. The respondent had acknowledged this.

A THE HIGH COURT'S DECISION

[9] In refusing to revise the sentence and dismissing the appeal, the High Court held that the fairest outcome is to maintain the sentence meted out by the sessions court, as the respondent had already pleaded guilty to the amended charge when it was read to him. The High Court also highlighted that the prosecution did not protest after the sessions court had passed the sentence following the erroneous amended charge. The High Court acknowledged that the sessions court should have imposed not less than ten strokes of whipping. However, it held that although the correct sentence had been explained to the respondent by the court before sentencing, it was only done after the critical process, namely where the respondent had pleaded guilty after the alleged erroneous amended charge was read to him. The sessions court's sentence was thus maintained, hence this appeal.

D THE APPEAL

[10] The prosecution submitted that the High Court had erred in law by affirming the sessions court's sentence of four strokes of whipping, contrary to the provision of s 39A(2) of the DDA 1952, which imposes not less than ten strokes of whipping. The prosecution highlighted the word 'shall' preceding 'whipping of not less than ten strokes', making it a mandatory provision.

[11] The prosecution also submitted that the respondent was not prejudiced as he had understood the nature and consequence of his guilty plea when the mandated sentence liable to be imposed on him was read and explained by the sessions court.

[12] Learned counsel for the respondent partly agreed with the prosecution and submitted that the High Court had erred in law by maintaining the whipping sentence passed by the sessions court, which was not in accordance with the law. The concession, however, ends there. Unlike the prosecution's stand that the whipping should be increased to not less than ten strokes, the respondent sought to be discharged and acquitted on the ground that there had been a serious miscarriage of justice towards him.

[13] Learned counsel for the respondent argued that the amended charge read to the respondent was defective as it failed to fulfil the requirements of s 152(4) of the Criminal Procedure Code ('the CPC'). The section reads as follows:

> 152 Form of charge
>
> ...
>
> (4) The law and section of the law against which the offence is said to have been

committed shall be mentioned in the charge.

...

[14] Learned counsel for the respondent argued that the sentencing provision in a charge is a legal requirement under s 152(4) of the CPC. In furthering his argument, learned counsel contended that the amended charge read to the respondent was defective as the sentencing provision in the amended charge was erroneous in that it had stipulated 'less than ten strokes' contrary to the mandatory requirement of 'not less than ten strokes' under s 39A(2) of the DDA 1952. Learned counsel also submitted that the respondent's plea to a defective charge could not be considered unequivocal and unqualified as he did not fully understand the charge framed against him and the consequences of pleading guilty to the alleged defective amended charge. Learned counsel also submitted that sub-s 173(b) of the CPC imposes a duty on the court to ensure that the accused's guilty plea must be unequivocal and unconditional and that the sessions court had failed to adhere to the requirements set out under this provision. It was also highlighted that the High Court had, in its judgment, stated that it could not be certain whether the respondent had pleaded guilty on the representation that the whipping would be less than ten strokes when the amended charge was read to him. In conclusion, learned counsel submitted that the respondent was deprived of the right to a fair hearing due to the session's court's omission and the prosecution's mistakes and should, therefore, be acquitted and discharged.

FINDINGS

[15] We will first address the issue of the amended charge, which the High Court viewed as defective. The provision on charges is contained in Chapter XVIII of the CPC, from ss 152 to 172. The form of a charge is set out under s 152 of the CPC, which states as follows:

152 Form of charge

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

[16] Sub-section 153(1) of the CPC requires the charge to contain the particulars of the time and place of the alleged offence and the person against whom the offence was allegedly committed as reasonably sufficient to give the accused notice of the matter he is charged with. Under s 154 of the CPC, the charge should contain particulars of how the alleged offence was committed if the particulars mentioned under ss 152 and 153 do not give the accused sufficient notice of the matter he is charged with. The format of a charge is provided in Form 27 in the CPC.

[17] Prosecutors have made it a practice to set out the sentence applicable to the offence in the charge form, possibly for convenience. In this case, as in many cases, the prosecution has set out the punishment for the offence in the charge form. The sentence on the whipping was wrong, as no less than ten strokes of whipping are to be prescribed, whether the accused is eventually convicted or chose to plead guilty.

[18] The pertinent issue is whether it is required to state the sentence applicable for the offence in the charge. There is no requirement for the sentence concerning the offence to be stated in the charge under the CPC, nor is this set out in Form 27 in the CPC. It is, therefore, optional for the sentence of the offence to be stated in the charge form, for it does not form part of the charge. It is simply not required. A charge, therefore, could not be deemed defective if the particulars of the sentence were not set out or, if set out, is erroneous.

[19] The High Court had erred in law when it chose to uphold the sentence of four strokes of whipping meted out by the sessions court on the basis that it would be the fairest outcome, as it is mandatorily provided under sub-s 39A(2) of the DDA 1952 that no less than ten strokes of whipping are to be prescribed. The sentencing provision set out in the charge does not override the Act.

[20] We have perused the relevant part of the notes of proceedings in the sessions court set out in the High Court's 'Grounds of Decision'. The respondent had pleaded guilty after the amended charge was read to him. The

court interpreter explained the nature and consequences of pleading guilty to the amended charge to the respondent, who then stated that he understood them. The respondent was then asked whether he knew that he was liable to be imprisoned for life or a term of not less than five years and would also be punished with not less than ten strokes of whipping. The respondent answered positively.

[21] The sessions court had adhered to the requirements under s 173 of the CPC as the court informed the respondent of the nature and consequence of pleading guilty, namely the sentence liable to be imposed on him. The sessions court, however, erred when it imposed only four strokes of whipping when at least ten strokes were to be imposed under sub-s 39A(2) of the DDA 1952. The sessions court is bound by the sentencing provision in the DDA 1952 and not merely rely on the sentence set out in the amended charge. The fault equally lies with the prosecutor, who should have been more vigilant.

[22] The High Court, however, fell into error in deciding that the fairest outcome was to maintain the sentence of four strokes of whipping, as this was in contravention of the mandatory sentencing requirements under sub-s 39A(2) of the DDA 1952, which require no less than ten strokes of whipping. Since the High Court opined that the respondent had pleaded guilty to the alleged defective amended charge, which stated whipping of less than ten strokes, he should be given the benefit of doubt, more so when he was not represented in the sessions court. The High Court should have allowed the appeal and remitted the case to the sessions court for the respondent's plea to be retaken. This directive would have been the fairest outcome.

[23] We are therefore of the considered opinion that the conviction recorded against the respondent is unsafe and we set aside both the conviction and sentence. Consequently, as conceded by the learned deputy public prosecutor and agreed by the learned counsel for the respondent, we make an order that this case be remitted back to the sessions court for a retrial.

Both conviction and sentence set aside; case remitted back to sessions court for retrial.

Reported by Dzulqarnain Ab Fatar